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VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Reply of Verizon in Support of Objections to Anthony Abate, President and CTO of SNiP LiNK, LLC, and Paul Hanser, Senior Director, Network Engineering, Eschelon Telecom, Inc., Having Access to Confidential Materials in WC Docket No. 04-313 and CC Docket No. 01-338.

Dear Ms. Dortch:

On October 21, the Verizon telephone companies (“Verizon”) objected to Anthony Abate, President and CTO of SNiP LiNK, LLC (“SNiP”), and Paul Hanser, Senior Director, Network Engineering, Eschelon Telecom, Inc. (“Eschelon”), having access to confidential materials in WC Docket No. 04-313 and CC Docket No. 01-338. On October 28, Stephen A. Augustino of Kelley Drye & Warren, LLP, responded with a letter that effectively confirms that these individuals are involved in competitive decision-making.¹ Therefore, Mr. Abate and Mr. Hanser should not be permitted to have access to confidential information in these proceedings.

1. As President of SNiP Link, Mr. Abate Is Involved In Competitive Decision-making

The Commission has previously had occasion to observe that, “it is difficult to fathom that a ‘Senior Vice President’ of a company does not participate in competitive decision-making.”² It is even more difficult to fathom that the *president* of the company is not involved in competitive decision-making, yet that is what SNiP must show in order for Mr. Abate to have

¹ See Letter to Marlene H. Dortch, Secretary, FCC, from Steven A. Augustino, Kelley Drye & Warren, LLP, WC Docket No. 04-313 (FCC filed Oct. 28, 2004).

² Order Ruling on Joint Objections, *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control*, 13 FCC Rcd 13478, 13479 (1998).

access to confidential material in this proceeding. *See* Protective Order ¶ 2. Ultimately, however, SNiP does not actually deny that its President and Chief Technology Officer, Mr. Abate, is not involved in competitive decision-making. Instead, the October 28 Letter claims that “[t]he information that Verizon has deemed confidential would not be used by SNiP LiNK . . . to perform ‘competitive decision-making’ *in the sense of attracting customers or developing advertising campaigns.*” Oct. 28 Letter at 3 (emphasis added). But even if this were true, it would be irrelevant, since Verizon’s information can be used for *other* types of competitive decision-making.

Verizon has provided detailed information relating to the pricing and deployment of SNiP’s competitors. For instance, Verizon has revealed its special access sales on a wire-center-by-wire-center basis. This kind of information would obviously be of great interest to SNiP in deciding where to collocate its own competitive facilities. It cannot be denied that this type of decision is competitively sensitive, and it has not been denied that Mr. Abate is involved in just such decisions.

As case after case has recognized, it is simply not possible for people to forget information they have learned in legal or regulatory proceedings when carrying out their other job duties. *See, e.g., United States v. Dentsply Int’l, Inc.*, 187 F.R.D. 152, 159-60 (D. Del. 1999) (restricting disclosure of confidential information to persons involved in “competitive decision making” and explaining that the touchstone for the inquiry is whether the individual “would have a difficult time compartmentalizing his knowledge” (internal quotation marks omitted)). In the present case, it would obviously be extremely difficult for Mr. Abate to set aside what he has learned from viewing confidential documents in this proceeding when performing his other business duties for SNiP. For that reason, he should not be allowed to view the competitively sensitive confidential information.

2. As Senior Director of Network Engineering, Mr. Hanser Is Involved In Competitive Decision-making

The proffered defense of Eschelon’s Mr. Hanser is similar to the defense of SNiP’s Mr. Abate, and it fails for the same reason: As Senior Director of Network Engineering, Mr. Hanser “oversees the operations of the facilities that Eschelon installs and leases.” Oct. 28 Letter at 4. The information about deployment of facilities by Eschelon’s competitors, as revealed by, for example, detailed data on Verizon’s special access sales, is directly relevant to competitive decisions on which Mr. Hanser is expected to advise. He therefore should not be permitted to have access to this information.

That Mr. Hanser is not a member of Eschelon’s Executive Council and thus does not have final decision-making authority is irrelevant. *See* Oct. 28 Letter at 4. All that matters is that Mr. Hanser’s “activities, association, and relationship” with Eschelon are such as to involve “advice and participation in any or all of the client’s business decisions made in light of similar or corresponding information about a competitor.” *Protective Order* ¶ 2. Even assuming for the sake of argument that Mr. Hanser is not involved in marketing or advertising decisions, it

remains true that decisions relating to Eschelon's network are competitively sensitive business decisions – and Eschelon has *admitted* that Mr. Hanser participates in such decisions.

The October 28 Letter argues (without citing any authority) that “To the extent that Mr. Hanser does not have the specific information disclosed by Verizon here, he is entitled to it” because “[n]o ILEC, including Verizon, is permitted to hide from a competitor information about its facilities – certainly not the facilities that are subject to unbundling and access obligations.” Oct. 28 Letter at 4. This argument is entirely beside the point because Verizon has not designated as confidential any information about its own network to which Mr. Hanser is entitled.³ In particular, contrary to what Eschelon seems to suppose, Verizon has *not* provided information about “Verizon's loop and transport deployment.” *Id.*

3. Both SNiP and Eschelon Have An Adequate Opportunity to Participate in These Proceedings, and Neither Has Provided Any Evidence Regarding The Duties of Mr. Abate and Mr. Hanser

The suggestion that blocking Mr. Abate and Mr. Hanser from having access to confidential information “robs” Eschelon and SNiP of an “adequate opportunity to participate in this case,” *id.* at 4-5, is absurd: Both companies are participating fully through their counsel, and their employees are eligible to view the confidential material so long as those employees are focused on regulatory, rather than business, issues and are not involved in competitive decision-making. Eschelon has designated at least three other employees to view this information: Bonnie Johnson, Director of ILEC Relations; Raymond Smith, Manager of ILEC Performance; and Kim Isaacs, ILEC Relations Process Specialist. SNiP is likewise free to designate other employees, experts, or counsel to represent it in viewing confidential material.

Furthermore, neither SNiP nor Eschelon has submitted any *evidence* of any kind with regard to their employees' participation in competitive decision-making. It is well established that “[t]he mere assertion that [employees] do not participate, without any type of substantiation, is insufficient.”⁴ This is particularly true where, as here, the assertion is plainly inconsistent with the company's own description of an employee's responsibilities. In the absence of any sort of affidavit or other evidence, the Commission has no factual basis on which to judge Mr. Abate's and Mr. Hanser's roles in their respective corporations.

³ To the extent that Eschelon believes that Verizon has improperly designated as confidential information about its network that should not have been so designated, however, the proper remedy is *not* to allow Mr. Hanser to view competitively sensitive information about the many CLECs with which Verizon interconnects. Rather, the appropriate remedy is to challenge the confidentiality designation, which neither Eschelon nor anyone else has done.

⁴ Order Ruling on Joint Objections, *Application of Worldcom, Inc., and MCI Communications Corp. for Transfer of Control*, 13 FCC Rcd 13478, ¶ 2 (1998).

4. Verizon Acted Promptly To Object To Mr. Abate and Mr. Hanser

The October 28 Letter asserts that Verizon's objections should be denied because they were filed late. Oct. 28. Letter at 2. In particular, it is argued that Acknowledgements of Confidentiality were faxed to Michael Kellogg of Kellogg, Huber, Hansen, Todd & Evans, on October 7, and that Verizon did not file any objections until October 21.⁵ But Mr. Kellogg does not represent Verizon in WC Docket No. 04-313. Instead, he represents SBC in this docket, as Kelley Drye and Warren's certificate of service for the October 7 filing seems to acknowledge. As a result, service by fax on Mr. Kellogg did not constitute proper service on Verizon and did not trigger an obligation for Verizon to object. *See Protective Order* ¶ 8.

Verizon employees with responsibility for these proceedings did not become aware of the filing until October 19, and Verizon acted promptly to file objections on October 21. In the meantime, Mr. Abate and Mr. Hanser presumably obtained access to confidential material. Thus, Verizon may have *already* suffered serious consequences from the apparent failure of counsel for SNiP and Eschelon properly to serve the Acknowledgements of Confidentiality on behalf of Mr. Abate and Mr. Hanser: There is no way to turn back the clock and erase from their memory the confidential information that these individuals have already seen. It is possible, however, for the Commission to prevent these individuals from having access to confidential information in the future – and it should issue an appropriate order without delay.

Furthermore, even if Verizon had been properly served and had, through an oversight, delayed in making its objections, the delay would not provide a basis for allowing Mr. Abate and Mr. Hanser to view confidential information. The Commission has already ruled in similar circumstances that the need to protect the integrity of the Commission's process for review of confidential information outweighs the procedural oversight that caused delay, especially where, as here, the party whose employees are blocked from viewing confidential information is represented by able outside counsel. *See Order Ruling on Joint Objections, GTE Corp., Transferor and Bell Atlantic Corp., Transferee*, 14 FCC Rcd 3364, 3365 n.6 (1999) (granting late-filed objections). To fail to block Mr. Abate and Mr. Hanser from having access to confidential information would not only harm the integrity of the Commission's review process but could also have a negative impact on the quality of the Commission's decision-making by creating an incentive for companies to withhold from the Commission competitively sensitive information that will not be adequately shielded from competitors.

To sum up, because SNiP and Eschelon have admitted facts indicating that Mr. Abate and Mr. Hanser advise or participate in competitively sensitive business decisions, they should not be allowed to have access to confidential information in this proceeding.

⁵ Although the October 28 Letter asserts that the documents were also hand delivered to Mr. Kellogg on that October 7, Verizon has so far been unable to verify this assertion. Attachment 3 to the October 28 letter appears to show a delivery to Mr. Kellogg's law firm on the *previous* day, October 6, which suggests that some other filing was being delivered.

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Respectfully submitted,

/s/ J.C. Rozendaal

J.C. Rozendaal

Counsel for the Verizon telephone companies

cc: Steven A. Augustino, Kelley Drye & Warren, LLP (via facsimile and overnight delivery)